

TWENTY–NINTH ANNUAL STETSON INTERNATIONAL ENVIRONMENTAL MOOT COURT

COMPETITION, 2024-2025

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**THE INTERNATIONAL COURT OF JUSTICE**



**AT THE PEACE PALACE**

**THE HAGUE, NETHERLANDS**

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QUESTIONS RELATING TO

**SUBSISTENCE USE AND TROPHY HUNTING**

2024 General List No. 175

**ASTOR**

(APPLICANT)

v.

**RISHMAK**

(RESPONDENT)

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**WRITTEN SUBMISSIONS *on behalf of the* RESPONDENT**

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C169	Indigenous and Tribal Peoples Convention (No. 169), June 27, 1989, 28 I.L.M. 1382 (entered into force Sept. 5, 1991)	5, 6, 7, 8, 10, 12, 13, 18
UNDRIP	United Nations Declaration on the Rights of Indigenous Peoples, G.A. Res. 61/295, U.N. Doc. A/RES/61/295 (Sept. 13, 2007).	4, 5, 6, 7, 8, 9, 10, 12, 13, 18
CITES	Convention on International Trade in Endangered Species of Wild Fauna and Flora, Mar. 3, 1973, 993 U.N.T.S. 243 (entered into force July 1, 1975).	21
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ICESCR	International Covenant on Economic, Social and Cultural Rights, Dec. 16, 1966, 993 U.N.T.S. 3.	6, 8, 10, 18
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## QUESTIONS PRESENTED

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- I. WHETHER THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS VIOLATES CONVENTIONAL INTERNATIONAL LAW?
  
- II. WHETHER THE BAN ON THE IMPORTATION OF ROYAL MARKHOR HUNTING TROPHIES VIOLATES CONVENTIONAL INTERNATIONAL LAW?



## STATEMENT OF JURISDICTION

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In accordance with Article 40(1) of the Statute of the International Court of Justice, the states of Astor and Rishmak have submitted to the International Court of Justice their special agreement pertaining to questions concerning their differences related to Subsistence Use and Trophy Hunting. The parties submitted a Special Agreement to the Registrar of ICJ on 1 July, 2024 which was acknowledged by the Registrar on 31 July, 2024.

Astor and Rishmak have accepted the jurisdiction of the ICJ pursuant to Article 36(1) of the Statute and request the Court to adjudge the dispute on the basis of the rules and principles of conventional international law, including any applicable treaties.



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## STATEMENT OF FACTS

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### **BACKGROUND**

Astor and Rishmak are central Asian, neighbouring, sovereign states. The Royal Markhors are a critically endangered species that currently live only in Astor and Rishmak, frequently migrating between the two countries.

### **ARTA**

Astor and Rishmak entered into a bilateral trade agreement entitled the Astor-Rishmak Trade Agreement [“**ARTA**”], which prohibits quantitative restrictions on imports, subject to exceptions relating to public morals and conservation of natural resources.

### **ACTIVITIES OF THE DIONE GINSU**

Astor and Rishmak strictly prohibit the taking of the Royal Markhor, with an exception for the Dione Ginsu community in Rishmak, which has deep-rooted cultural ties with the animal. Since 2009, only 10 Royal Markhors were permitted to be hunted annually. Since 2016, the Dione Ginsu have auctioned their hunting rights, allocating 75% of the funds raised to community expenses, 15% to Royal Markhor conservation and the rest to the auction organisers. Post each hunt, the meat was retained by the Dione Ginsu and the hide and horns were imported to Astor.

### **IMPORT BAN BY ASTOR**

In December 2022, Astor passed a law prohibiting the importation of hunting trophies, eight months after concerns regarding the hunting were first raised with Rishmak. Astor also proposed a bill banning domestic trophy hunting, which failed to pass into law. As a result of the import ban, the Dione Ginsu could no longer auction off their hunting rights.

### **THE DISPUTE**



Rishmak raised objections to the import ban, alleging an infringement on the subsistence rights of the Dione Ginsu, and that the ban constitutes a quantitative restriction violating ARTA. Astor, conceding that the ban is a quantitative restriction, invoked the exceptions relating to public morals and conservation of natural resources. Following unsuccessful negotiations, the parties submitted the dispute to the International Court of Justice [**ICJ**].



## SUMMARY OF ARGUMENTS

### **I. THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW.**

Trophy hunting through the auction process is protected by indigenous peoples' rights in conventional international law. The Dione Ginsu community's actions are protected under their self-determination rights, including their right to lands, culture, economic development and decision-making. Trophy hunting rights are transferable outside the community. Additionally, trophy hunting complies with the exceptions to the prohibition on taking under the Convention on Migratory Species, as it was for scientific, conservation and subsistence purposes, and was an extraordinary circumstance.

### **II. THE BAN ON THE IMPORTATION OF ROYAL MARKHOR HUNTING TROPHIES VIOLATES CONVENTIONAL INTERNATIONAL LAW.**

The importation ban imposed by Astor is not justified under the exceptions to Article 11 of ARTA i.e. under Article 20(A) as relating to public morals and Article 20(G) as relating to the conservation of exhaustible natural resources. Moreover, the ban does not fulfil the mandate of the chapeau to Article 20 because the ban constitutes as a disguised restriction on trade and is discriminatory in nature. Astor, while imposing the ban, has not imposed similar restrictions in its domestic consumption or production. The ban deprives both Rishmak as well as the Dione Ginsu community from achieving their conservation efforts as the ban restricts the financial earnings from the sale of the Auction rights. Additionally, the ban is in Violation of Article III read with Resolution 2.11 and 6.7 of CITES as Astor disregards the cooperative framework of CITES and imposed the ban unilaterally without discussing with Rishmak.





## ARGUMENTS ADVANCED

### **I. THE TROPHY HUNTING OF THE ROYAL MARKHOR THROUGH THE AUCTION PROCESS COMPLIES WITH CONVENTIONAL INTERNATIONAL LAW.**

Trophy hunting through the auction process is protected under the conventional international law of indigenous peoples [A]; and does not violate the Convention on the Conservation of Migratory Species of Wild Animals [“CMS”] [B].

#### **A. TROPHY HUNTING THROUGH THE AUCTION PROCESS IS PROTECTED UNDER THE CONVENTIONAL INTERNATIONAL LAW OF INDIGENOUS PEOPLES.**

Indigenous peoples have distinct collective rights guaranteed under treaty law which are enforceable against all states as these rights constitute customary international law [“CIL”] [i]; and these rights protect trophy hunting through the auction process [ii]. Further, the hunting rights of the Dione Ginsu community are transferable [iii].

##### **(i) Conventional International Law of Indigenous Peoples constitutes CIL.**

CIL is established by state practice and *opinio juris*,<sup>1</sup> and gives binding force to United Nations [“UN”] declarations<sup>2</sup> and imposes treaty obligations on non-signatory states.<sup>3</sup> International instruments protecting indigenous rights, namely the United Nations Declaration on the Rights of Indigenous Peoples [“UNDRIP”] [a]; and the Indigenous and Tribal Peoples Convention [“C169”] and the International Covenant on Economic, Social and Cultural Rights [“ICESCR”] [b],

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<sup>1</sup> North Sea Continental Shelf (Ger. v. Neth.; Ger. v. Den.), Judgment, 1969 I.C.J. 3 ¶231 (Feb. 20).

<sup>2</sup> Legality of the Threat or Use of Nuclear Weapons, Advisory Opinion, 1996 I.C.J. 3 (Jul. 8).

<sup>3</sup> VCLT art. 38.



constitute CIL. In any case, subsistence rights granted under these instruments are recognised as CIL [c].

*a. UNDRIP constitutes CIL.*

UNDRIP protects communities that are recognised as “indigenous peoples” in international law.<sup>4</sup> 143 of the 158 voting countries favoured its adoption in the United Nations General Assembly [“UNGA”], and the 4 that voted against it have reversed their positions.<sup>5</sup> UNDRIP has been reaffirmed 8 times in the UNGA,<sup>6</sup> reflects global consensus,<sup>7</sup> and informs the work of various state and non-state actors,<sup>8</sup> substantiating the required “extensive and virtually uniform” state practice.<sup>9</sup> *Opinio juris* also exists as UNDRIP is largely a restatement of already existing customary law<sup>10</sup>

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<sup>4</sup> Subcomm. On Prevention of Discrimination against Indigenous Populations, U.N. Doc. E/CN.4/Sub.2/1986/7/Add. 1–4.

<sup>5</sup> Rep. of the U.N.H.R.C., The United Nations Declaration on the Rights of Indigenous Peoples: A Manual for National Human Rights Institutions, p. 39. U.N. Doc. HR/PUB/13/2.

<sup>6</sup> G.A. Res. 65/198, 66/142, 67/153, 68/149, 69/2, 69/159, 70/232 and 71/178.

<sup>7</sup> Rep. of the Expert Mechanism on the Rights of Indigenous Peoples, U.N. Doc. A/HRC/36/56.

<sup>8</sup> e.g. World Bank, Environmental and Social Framework, ESS7, (2017), <https://pubdocs.worldbank.org/en/837721522762050108/Environmental-and-Social-Framework.pdf#page=89&zoom=80>.

<sup>9</sup> *Supra* note 1.

<sup>10</sup> M. Barelli, *The Role of Soft Law in the International Legal System: The Case of the United Nations Declaration on the Rights of Indigenous Peoples*, 58 INT’L COMPAR. L. Q. 957, 966 (2009).



i.e. the international human rights framework,<sup>11</sup> is subject to Universal Periodic Reviews in which states have consistently acknowledged their duties towards indigenous peoples,<sup>12</sup> and has been adopted in various domestic legislations.<sup>13</sup>

The Dione Ginsu community qualifies as an ‘indigenous community’ and is entitled to the protections under UNDRIP. *Therefore*, UNDRIP constitutes CIL and is enforceable against Astor.

***b. C169 and ICESCR constitute CIL.***

C169 and UNDRIP complement and reinforce each other,<sup>14</sup> and the effective implementation of C169 helps achieve the objectives of UNDRIP and UN Sustainable Development Goals [“SDGs”].<sup>15</sup> Given that UNDRIP has been established as CIL, it follows that C169, as the foundation upon which UNDRIP is built, similarly holds the status of CIL. C169 has influenced domestic indigenous laws across the world,<sup>16</sup> further enhancing its CIL status. For instance, Australian courts have held that although C169 is not binding on Australia, it should take it into

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<sup>11</sup> Rep. of the O.H.C.H.R., The United Nations Human Rights Treaty System, Fact Sheet No. 30/Rev. 1.

<sup>12</sup> Rep. of the Working Group on the Universal Periodic Review, U.N. Docs. A/HRC/12/8/Add.1, ¶6, A/HRC/11/17, ¶86 and Recommendations 45, 52.

<sup>13</sup> *e.g.* UNDRIP Act, SC 2021, c. 14 (Can.).

<sup>14</sup> Understanding the C.169, Handbook for I.L.O. Tripartite Constituents, at 10.

<sup>15</sup> Rep. of the I.L.O., Sustainable Development Goals Indigenous Peoples in Focus.

<sup>16</sup> Rep. of the I.L.O, Application of Convention No. 169 by Domestic and international Courts in Latin America, at 23-35.



account due to its universal application.<sup>17</sup> ICESCR forms a part of international human rights law<sup>18</sup> as “universal, indivisible, interdependent and interrelated” rights,<sup>19</sup> thereby forming CIL.

Therefore, indigenous rights guaranteed under C169 and ICESCR constitute CIL and are enforceable against Astor.

***c. In any case, subsistence rights under UNDRIP and C169 are recognised as CIL.***

For indigenous peoples, the right to self-determination encompasses the right to fulfil the human needs of the community,<sup>20</sup> as well as the right to preserve their cultural identity,<sup>21</sup> both of which are crucial to protecting their subsistence rights.<sup>22</sup> The right of self-determination is expressly protected under UNDRIP,<sup>23</sup> following which it has been conclusively established that indigenous peoples’ self-determination is not a *sui generis* right, but a general right.<sup>24</sup>

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<sup>17</sup> Police v. Abdulla (1999) 106 A Crim R 466, 472.

<sup>18</sup> Rep. of the Comm. on Economic, Social and Cultural Rights, Fact Sheet No.16/Rev.1.

<sup>19</sup> World Conference on Human Rights, *Vienna Declaration and Programme of Action*, ¶5, U.N. Doc. A/CONF.157/24 (Part 1) (Oct. 13 1993).

<sup>20</sup> Social Justice Report, Australian Human Rights Commission, 2011.

<sup>21</sup> Rep. of the Int’l Conference of Experts held in Barcelona, U.N. Doc. UNESCO(063)/C748, at 19.

<sup>22</sup> Yakye Axa v. Paraguay.

<sup>23</sup> UNDRIP art. 3.

<sup>24</sup> JAMES ANAYA, MAKING THE DECLARATION WORK: THE UNITED NATIONS DECLARATION ON THE RIGHTS OF INDIGENOUS PEOPLES, 193 (Claire Charters et al. eds., 2009).

This general right is applied in indigenous contexts for the realisation of their subsistence rights.<sup>25</sup> Thereby, since self-determination is recognised internationally as CIL<sup>26</sup> and a *jus cogens* norm,<sup>27</sup> this status also extends to the self-determination rights of indigenous peoples. The substantive aspects of indigenous self-determination,<sup>28</sup> which include land and resource rights,<sup>29</sup> cultural rights<sup>30</sup> and economic development rights,<sup>31</sup> reflect state practice due to “very widespread agreement”,<sup>32</sup> and are recognised as CIL.<sup>33</sup> Procedural self-determination rights,<sup>34</sup> which include

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<sup>25</sup> Kaliña and Lokono Peoples v. Suriname.

<sup>26</sup> Western Sahara, Advisory Opinion, 1975 I.C.J. 12, ¶54-59 (Dec. 13).

<sup>27</sup> East Timor (Port. v. Austl.), Judgment, 1995 I.C.J. 90, ¶29 (June 30).

<sup>28</sup> Int’l L. Ass’n, *Rights of Indigenous Peoples*, Res. No. 5/2012 (Aug. 26-30, 2012).

<sup>29</sup> UNDRIP art. 25, 26.1, 26.2; C169 art. 14.1.

<sup>30</sup> UNDRIP art. 11, 15, 16, 31; C169 art. 5.

<sup>31</sup> UNDRIP art. 20, 23; C169 art. 2.2(c), 7.2.

<sup>32</sup> James Anaya and Siegfried Wiessner, *The UN Declaration on the Rights of Indigenous Peoples: Towards Re-empowerment*, 3 JURIST (2007).

<sup>33</sup> *Supra* note 28.

<sup>34</sup> Rep. of the Expert Mechanism on the Rights on Indigenous Peoples, U.N. Doc. A/HCR/EMRIP/2011/2.

internal and external decision making,<sup>35</sup> are also recognised as CIL, as they enjoy widespread state practice<sup>36</sup> and evidence of *opinio juris*.<sup>37</sup>

Therefore, the self-determination rights of the Dione Ginsu community under UNDRIP and C169, which protect their subsistence rights, constitute CIL and are enforceable against Astor.

(ii) **Trophy hunting through the auction process is protected under conventional international law.**

Trophy hunting through the auction process is protected under the Dione Ginsu community's self-determination rights under UNDRIP and C169, which include the right to land and resources [a]; cultural integrity [b]; and economic development [c]. Further, Astor is obligated to consult the community under their right to decision-making and has failed to do so [d].

*a. The community's actions are protected under their right to land and resources.*

Indigenous peoples' land and resource rights are protected under C169,<sup>38</sup> UNDRIP<sup>39</sup> and ICESCR.<sup>40</sup> Land does not merely mean territorial ownership but also possession of the 'total

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<sup>35</sup> UNDRIP art. 5, 18, 19, 36 and 37; C169 art. 6.

<sup>36</sup> *Supra* note 32.

<sup>37</sup> Rep. of the Expert Mechanism on the Rights on Indigenous Peoples, U.N. Doc. A/HRC/18/42; Siegfried Wiessner, *Rights and Status of Indigenous Peoples: A Global Comparative and International Legal Analysis*, 12 HARVARD HUM. RTS. J. 57 (1999).

<sup>38</sup> C169 art. 7, 13-19.

<sup>39</sup> UNDRIP art. 8.2(b), 25-28 and 32.

<sup>40</sup> ICESCR art. 1.2, 25.



environment’ used.<sup>41</sup> This extends to the right over living resources,<sup>42</sup> including wildlife.<sup>43</sup> Hunting is explicitly protected under C169,<sup>44</sup> as it protects the spiritual relationship that indigenous peoples share with their lands.<sup>45</sup> Indigenous peoples are also entitled to devise their own strategies for the development of their resources,<sup>46</sup> and may use them as they see fit.<sup>47</sup> The Inter-American Court of Human Rights [“**IACtHR**”] concluded that indigenous peoples’ relationship with their lands may be expressed through “ceremonial ties, traditional forms of subsistence like hunting, and use of resources associated with their custom.”<sup>48</sup> Further, community members cannot be stopped from carrying out such activities that “reveal the enduring nature of their relationship with traditional lands.”<sup>49</sup>

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<sup>41</sup> RAJAMANI ET. AL. (EDS), THE OXFORD HANDBOOK OF INTERNATIONAL ENVIRONMENTAL LAW (2nd ed. 2021).

<sup>42</sup> C169 art. 15.

<sup>43</sup> *Supra* note 41.

<sup>44</sup> C169 art. 23.

<sup>45</sup> C169 art. 13.

<sup>46</sup> UNDRIP art. 32.1.

<sup>47</sup> Rep. of the U.N. Technical Conference on Practical Experience in the Realization of Sustainable and Environmentally Sound Self-Development of Indigenous Peoples, U.N. Doc. E/CN.4/Sub.2/1992/31/Add.1.

<sup>48</sup> *Xákmok Kásek Indigenous People v. Paraguay*.

<sup>49</sup> *Sawhoyamaxa Indigenous Community v. Paraguay*.

The Dione Ginsu community enjoys a spiritual relationship with their lands and resources, specifically the Royal Markhor, since time immemorial.<sup>50</sup> This evidences their right not only to hunt but also to develop their own strategies for the use of the Markhor. The auction process<sup>51</sup> is one such strategy for the Dione Ginsu community to use their resources for their development.

*Therefore*, the community's actions are protected under their right to land and resources.

***b. The community's actions are protected under their right to cultural integrity.***

Indigenous peoples' right to culture is protected under C169,<sup>52</sup> UNDRIP<sup>53</sup> and ICESCR.<sup>54</sup> Hunting is recognised as integral for the maintenance of indigenous culture,<sup>55</sup> and indigenous peoples have the right to control and develop their traditional cultural expressions,<sup>56</sup> including ceremonial objects.<sup>57</sup> Cultural self-determination of indigenous peoples has been defined as the right to "recapture identity, reinvigorate their ways of life... and manifest their culture".<sup>58</sup> The IACtHR upheld indigenous peoples' right to practice, participate in, and revitalise their culture for

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<sup>50</sup> Record ¶14.

<sup>51</sup> Record ¶16.

<sup>52</sup> C169 art. 5.

<sup>53</sup> UNDRIP art. 11-13, 15 and 31.

<sup>54</sup> ICESCR art. 15.1(a).

<sup>55</sup> *Supra* note 44.

<sup>56</sup> UNDRIP art. 31.

<sup>57</sup> UNDRIP art. 12.

<sup>58</sup> Int'l L. Ass'n, *Interim Report: The Hague Conference, Rights of Indigenous Peoples*, at 11 (2010).



themselves and for future generations,<sup>59</sup> and recognised hunting as a characteristic element of their culture.<sup>60</sup> Development of indigenous culture includes not only its past, but also its present and future manifestations,<sup>61</sup> acknowledging the reality that indigenous culture is continuously evolving and not static.<sup>62</sup>

The Dione Ginsu community traditionally associated the Royal Markhor with strength and prosperity, hunting them since time immemorial,<sup>63</sup> which accords them cultural rights over the animal. Traditionally, they acquired meat and horns for food and as ceremonial objects respectively,<sup>64</sup> a manifestation of their cultural right to hunt. With their hunting rights restricted,<sup>65</sup> the community shifted their practices to meet modern needs. *Firstly*, the auctioning of hunting rights<sup>66</sup> and sale of horns and hides,<sup>67</sup> reflects a present manifestation of their cultural traditions, revitalised in alignment with their evolving circumstances. Such evolution is not a deviation from

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<sup>59</sup> *Maya Kaqchikel Indigenous Peoples of Sumpango and Others v. Guatemala*.

<sup>60</sup> *Kichwa Indigenous People of Sarayaku v. Ecuador*.

<sup>61</sup> UNDRIP art. 11.

<sup>62</sup> Ranjan Datta, *A relational theoretical framework and meanings of land, nature, and sustainability for research with Indigenous communities*, 20.1 LOCAL ENVIRONMENT 102-113, (2015).

<sup>63</sup> Record ¶14.

<sup>64</sup> Record ¶14.

<sup>65</sup> Record ¶15.

<sup>66</sup> Record ¶16.

<sup>67</sup> Record ¶17.

tradition but an expression of their right to cultural self-determination, which allows indigenous peoples to adapt and innovate in ways that ensure the survival of their culture for future generations. *Secondly*, the community uses traditional methods to lure male Royal Markhors and keeps the meat for consumption,<sup>68</sup> implying that change in the hunters does not rid the practice of its cultural significance to the community.

*Therefore*, the community's actions are protected under their right to cultural integrity.

***c. The community's actions are protected under their right to economic development.***

Indigenous peoples' right to economic development is protected under C169,<sup>69</sup> UNDRIP<sup>70</sup> and ICESCR.<sup>71</sup> C169 aims to eliminate socio-economic gaps between indigenous and other people in a manner compatible with their aspirations and ways of life.<sup>72</sup> Hunting is recognised as a very important aspect of their economic self-reliance.<sup>73</sup> Indigenous peoples should be enabled to improve their working conditions, health and education and they have the right to implement such strategies through their own institutions.<sup>74</sup> Indigenous peoples also have the right to finance their

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<sup>68</sup> Record ¶17.

<sup>69</sup> C169 art. 2, 7.

<sup>70</sup> UNDRIP art. 20, 23.

<sup>71</sup> ICESCR art. 11.

<sup>72</sup> C169 art. 2.2(c).

<sup>73</sup> C169 art. 23.

<sup>74</sup> UNDRIP art. 23.

autonomous functions.<sup>75</sup> Goal 8 of the UN SDGs advocates for sustained economic growth and decent work, which guarantees meaningful opportunities to get productive work.<sup>76</sup>

*Firstly*, the money raised from the auction process is significant in closing the socio-economic gaps between the Dione Ginsu community and other people. *Secondly*, trophy hunting has proven to generate more revenue than tourism and other alternatives without negatively impacting conservation,<sup>77</sup> as seen in the cases of Zimbabwe<sup>78</sup> and Namibia,<sup>79</sup> thereby proving to be the best alternative for financing the economic and social development of indigenous communities. *Thirdly*, through the auction, the Dione Ginsu are enabled to collectively improve their housing, medical, health and working conditions<sup>80</sup> through their own institutions. Further, trophy hunting hires Dione Ginsu members as guides,<sup>81</sup> providing them crucial employment opportunities, which contributes to their economic growth and poverty alleviation.

*Therefore*, the community's actions are protected under their right to economic development.

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<sup>75</sup> UNDRIP art. 4.

<sup>76</sup> G.A. Res. A/RES/70/1, The 2030 Agenda for Sustainable Development (Sept. 25, 2015).

<sup>77</sup> Baker J.E. et. al., *Trophy Hunting as a Sustainable Use of Wildlife Resources in Southern and Eastern Africa*, 5(4) J. SUSTAINABLE TOURISM, 306–321 (1997).

<sup>78</sup> Frost et. al., *The CAMPFIRE Programme in Zimbabwe: Payments for Wildlife Services*, 65.4 ECOLOGICAL ECON., 776-787 (2008).

<sup>79</sup> R. Naidoo et. al., *Complementary benefits of tourism and hunting to communal conservancies in Namibia*, 30 CONSERVATION BIOLOGY, 628-638 (2016).

<sup>80</sup> Record ¶16.

<sup>81</sup> Record ¶17.



***d. Astor is obligated to consult the community under their right to decision-making and has failed to do so.***

Human rights are extended to all people without distinction on jurisdictional grounds,<sup>82</sup> and states have obligations beyond their own borders for ESC rights.<sup>83</sup> FPIC, expressly protected under UNDRIP<sup>84</sup> and inextricably linked to indigenous peoples' self-determination rights,<sup>85</sup> underscores that their free and informed consent should be sought before making decisions that affect them,<sup>86</sup> especially concerning the use of their resources.<sup>87</sup> Courts have ruled that in addition to consultation,<sup>88</sup> consent of indigenous peoples must be accorded when it comes to their rights over land and resources.<sup>89</sup>

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<sup>82</sup> UDHR art. 2.

<sup>83</sup> Maastricht Principles on Extraterritorial Obligations of States in the Area of Economic, Social and Cultural Rights, Sept. 28, 2011.

<sup>84</sup> UNDRIP art. 19.

<sup>85</sup> *Supra* note 34.

<sup>86</sup> *Free, Prior and Informed Consent Manual*, F.A.O. (2016).

<sup>87</sup> UNDRIP art. 32(2).

<sup>88</sup> C169 art. 6; Int'l Law Comm'n, Rep. of on the work of its Ninety-Eighth Session (2009).

<sup>89</sup> *Endorois Welfare Council v. Kenya*, Communication 276/2003, Afr. Comm'n H.P.R. (Feb. 4, 2010); *Saramaka People v. Suriname*, Preliminary Objections, Merits, Reparations, and Costs, Judgement (ser. C) No. 160 ¶162 (Nov. 25, 2006).



As indigenous rights are part of international human rights<sup>90</sup> and ESC rights,<sup>91</sup> they also extend universally and impose extra-territorial obligations on states. It follows that before making decisions that affect indigenous peoples, states are obligated to consult the community affected with the objective of obtaining their consent.<sup>92</sup> Imposing a ban on the import of hunting trophies<sup>93</sup> adversely affects the subsistence rights of the community by disrupting their established auction process and limiting their economic opportunities. Such a measure cannot be taken without seeking their consent.

*Therefore*, Astor is obligated to consult the community under their right to decision-making and has failed to do so.

**(iii) Hunting rights of the community are transferable.**

C169 expressly provides for indigenous peoples to transmit their land rights, and thereby their resources,<sup>94</sup> outside their own community.<sup>95</sup> Moreover, indigenous peoples have the internal decision-making power to devise their own strategies of economic and social development.<sup>96</sup>

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<sup>90</sup> United Nations Human Rights System, Fact Sheet No. 9/Rev. 2.

<sup>91</sup> U.N. Committee on Economic, Social and Cultural Rights, Rep. on the work of its 5<sup>th</sup> Session, U.N. Doc. E/C.12/1990/8.

<sup>92</sup> Rep. of the Expert Mechanism on the Rights on Indigenous Peoples, ¶9, U.N. Doc. A/HRC/18/42/Annex, (2011).

<sup>93</sup> Record ¶29.

<sup>94</sup> *Supra* note 42.

<sup>95</sup> C169 art. 17.2.

<sup>96</sup> UNDRIP art. 23, 32.



*Firstly*, the community is entitled to transfer their hunting rights over the Royal Markhor to foreign hunters under C169 as the animal is a resource recognised within their land rights. *Secondly*, Dione Ginsu members have the autonomy to devise their own strategies of development, and this includes the transmitting of hunting rights outside their own community in order to achieve economic development. Transferring hunting rights was the optimal measure for balancing cultural integrity and development, as it avoided the extreme alternatives of fully transferring their territorial lands to foreign hunters, which would have severely compromised their cultural rights, or foregoing the auction altogether, which would have caused significant economic hardship for the community.

*Therefore*, hunting rights of the community are transferable.

**B. TROPHY HUNTING THROUGH THE AUCTION PROCESS DOES NOT VIOLATE CMS.**

Trophy Hunting through the auction process does not violate CMS as it complies with the exceptions under Article III.5.a [i], III.5.b [ii]; III.5.c [iii] and III.5.d [iv] of CMS.

**(i) Trophy hunting complies with Article III.5.a of CMS.**

Article III.5.a allows for the taking of species listed in Appendix I if such taking is for scientific purposes.<sup>97</sup> Research is an established scientific purpose as it is a method of systematic observation and experiment.<sup>98</sup> CMS parties regard biomedical research as falling within the scope of scientific purposes.<sup>99</sup> Further, ICJ observed that economic benefits derived from a practice cannot solely negate the scientific nature of an activity, and even if there are other motives besides scientific

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<sup>97</sup> CMS art. III(5)(a).

<sup>98</sup> *Science Definition*, Oxford Online <https://en.oxforddictionaries.com/definition/science>.

<sup>99</sup> Directive 2010/63/EU, Protection of Animals used for Scientific Purposes, 2010 (EU).



research, it does not stop the program from being considered as serving the purpose of scientific research.<sup>100</sup>

The auction-based trophy hunting system complies with this exception because a major portion of the funds that were allocated toward Royal Markhor conservation were specifically used for research to develop vaccines and other treatments to respond to *Mycoplasma capricolum* infections that fatally affected Royal Markhors.<sup>101</sup> Merely because the funds raised are used for other purposes including subsistence and conservation does not take away the fact that the activity is fulfilling a crucial scientific purpose.

*Therefore*, trophy hunting complies with Article III.5.a.

(ii) **Trophy hunting complies with Article III.5.b of CMS.**

Article III.5.b allows hunting for the purpose of enhancing the propagation or survival of the species.<sup>102</sup>

*a. The purpose of taking of the Royal markhor is for the conservation of the species.*

*Firstly*, 15% of the funds raised from the auction are devoted towards conservation,<sup>103</sup> indicating that enhancing the propagation and survival of the Royal Markhor is one of the primary purposes of the trophy hunting process. CMS does not mandate that conservation should be the sole purpose of an activity in order to qualify under the exception as such a restrictive reading would defeat the

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<sup>100</sup> Whaling in the Antarctica (Australia v. Japan: New Zealand intervening), 2014, I.C.J. 226 (Mar. 31) ¶¶94, 97.

<sup>101</sup> Record ¶18.

<sup>102</sup> CMS art. III(5)(b).

<sup>103</sup> Record ¶16.

object and purpose of the convention.<sup>104</sup> *Secondly*, economic benefits derived by the Dione Ginsu community can be directly linked to the species' conservation as these funds incentivise the community to actively take part in conservation efforts. Thus, these conservation-driven economic incentives ensure that the ultimate goal remains the propagation and survival of the species.

*Therefore*, the purpose of taking of the Royal Markhor is for the conservation of the species.

***b. Trophy hunting through the auction process enhances the propagation and survival of the species.***

***1. The limited hunt ensures conservation.***

The Caprinae Specialist Group of the International Union for the Conservation of Nature [“IUCN”] concluded that limited trophy hunting of males in the *Caprinae* subfamily does not negatively affect their populations,<sup>105</sup> and it does not affect reproduction rates due to the sexually dimorphic nature of Caprinae. There are no documented extinctions solely due to trophy hunting.<sup>106</sup> Conversely, trophy hunting has contributed to population recovery in the case of several endangered species.<sup>107</sup> For instance, trophy hunting and auction programs for the Markhor in

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<sup>104</sup> VCLT art. 31(2).

<sup>105</sup> Bellon L., *Sustainable Conservation and Grassroot Realities*, Best Practices in Sustainable Hunting, 27, 20 (2008).

<sup>106</sup> L. Palazy et al., *Response: Rarity, Trophy Hunting, and Ungulates*, 18 ANIMAL CONSERVATION, 16 (2012).

<sup>107</sup> Informing Decisions on Trophy Hunting, IUCN 2016. Annex – Case Studies.





Pakistan have led to significant population growth,<sup>108</sup> improved their conservation status in the IUCN Red List<sup>109</sup> and the United Nations Environment Programme [“UNEP”] reported a positive opinion on their trophy hunting and trade.<sup>110</sup>

*Firstly*, the Royal Markhor is a species (*capra*) within the *Caprinae* subfamily. Sufficient scientific evidence as well as practical implementation of trophy hunts have proven that the practice will enhance the propagation or survival of the species. *Secondly*, for species similar to the Markhor, harvesting trophy males up to 2% of the total population is considered safe.<sup>111</sup> Considering that the *Capra Falconeri*, a species within the same genus as the Royal Markhor, has had an annual population growth rate of 2%, hunting of as many as 44 males annually would not have negative consequences. Thus, the limited annual hunt of merely 10 individuals,<sup>112</sup> under strict regulatory oversight, ensures the preservation of the population while contributing financially to the species' protection.

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<sup>108</sup> Woodford M.H. et. al., *The Torghar Conservation Project: Management of the Livestock, Suleiman Markhor (Capra Falconeri) And Afghan Urial (Ovis Orientalis) in the Torghar Hills, Pakistan*, 21 GAME WILD SCI, 177, 182 (2004).

<sup>109</sup> Michael S., *Improved Markhor Status in the Latest IUCN List*, 4 HUNTER'S PATH, 79, 80 (2015).

<sup>110</sup> UNEP-WCMC. 2018. Overview of taxon/country combinations subject to long-standing positive opinions. Part I: Hunting trophies. UNEP-WCMC, Cambridge.

<sup>111</sup> Adhikari L. et. al., *Community-based Trophy Hunting Programs Secure Biodiversity and Livelihoods*, 4 ENVIRONMENTAL CHALLENGES (2021).

<sup>112</sup> Record ¶15.



*Therefore*, the limited hunt ensures conservation.

2. Trophy hunting decreases poaching.

IUCN states that trophy hunting helps in protecting wildlife from poaching.<sup>113</sup> For instance, in Namibia, locals were able to reap economic benefits through trophy hunting, which incentivised them to not engage in poaching as they were able to gain benefits through legal means.<sup>114</sup>

Trophy hunting of the Royal Markhor will serve as a deterrent for poachers and Astor's contention that hunting can lead to increased poaching,<sup>115</sup> is thus incorrect.

*Therefore*, trophy hunting decreases poaching, thereby enhancing the survival of the species, and thus complies with Article III.5.b.

(iii) **Trophy hunting complies with Article III.5.c of CMS.**

Article III.5.c allows hunting if it accommodates the needs of traditional subsistence users.<sup>116</sup> The auction system benefits the Dione Ginsu, a traditional indigenous community that has historically relied on the Royal Markhor for cultural and subsistence purposes.

*a. The funds are devoted to the subsistence needs of the Dione Ginsu community.*

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<sup>113</sup> *Trophy Hunting and the Conservation Argument*, Green Eco Friend (March 18, 2021), <https://greenecofriend.co.uk/conservation-and-trophy-hunting/>.

<sup>114</sup> Niki Rust, *Trophy Hunting is not poaching and can help conserve wildlife*, The Conversation (Aug 14, 2014), <https://theconversation.com/trophy-hunting-is-not-poaching-and-can-help-serve-wildlife-29938>.

<sup>115</sup> Record ¶33.

<sup>116</sup> CMS art. III(5)(c).

Hunting is an important aspect of subsistence use for traditional users, who are entitled to economic development through the activity.<sup>117</sup> For instance, the Inter-American Convention for the Protection and Conservation of Sea Turtles prohibits the intentional killing of sea turtle eggs except when it is done to satisfy the economic subsistence needs of traditional communities.<sup>118</sup> This includes not only their right to hunt and eat but also to hunt and sell if it is for their subsistence.<sup>119</sup> Domestic courts have upheld hunting rights to protect the subsistence use of traditional communities, as seen in the Botswana's overturning of hunting restrictions in the Kalahari game Reserve,<sup>120</sup> and the African Commission's ruling in favour of the Ogiek community's cultural practices.<sup>121</sup>

Funds from the auction are used for basic necessities such as food and shelter for the Dione Ginsu community.<sup>122</sup> Members of the community also got employment as guides during the hunt.<sup>123</sup> The Dione Ginsu community is not only permitted to hunt for consumption but also for sale and such practice constitutes subsistence use.

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<sup>117</sup> C169 art. 23; ICESCR art. 11; UNDRIP art. 26.

<sup>118</sup> Inter-American Convention for the Protection and Conservation of Sea Turtles, art. IV.3.a.

<sup>119</sup> 10<sup>th</sup> Conference of Parties, *Exceptions Under Article IV (3a and 3b) for Subsistence Harvesting of Lepidochelys olivacea eggs in Costa Rica*, CIT-COP10-2022-R5 (June 15-17, 2022).

<sup>120</sup> *Sesana and Others v. The Attorney General*, Judgment, 2006 BWHC 1 (Dec. 13, 2006).

<sup>121</sup> *African Commission on Human and Peoples' Rights v. Republic of Kenya*, Judgment, 2017 AfCHPR 2, ¶68 (May 26, 2017).

<sup>122</sup> Record ¶16.

<sup>123</sup> Record ¶17.



Therefore, the funds are devoted to the subsistence needs of the Dione Ginsu community.

***b. The Royal Markhor is being used in a manner that accommodates the needs of traditional subsistence users.***

Firstly, Astor's interpretation that the taking must only be done by traditional users<sup>124</sup> is incorrect because the provision does not mandate that the taking must only be done by traditional users themselves. The purpose of the provision is only to ensure that their needs are accommodated for.<sup>125</sup> Secondly, Astor's contention that the Royal Markhor is not being used in a traditional manner<sup>126</sup> is also incorrect because "subsistence users" in Article III(5)(c) is being qualified by the term "traditional" implying that the users themselves must be traditional, not that the manner of use must be traditional.

Therefore, the Royal Markhor is being used in a manner that accommodates the needs of traditional subsistence users, thereby complying with Article III.5.c.

**(iv) Trophy hunting complies with Article III.5.d of CMS.**

Article III.5.d allows hunting in extraordinary circumstances.<sup>127</sup> CMS parties include disease outbreak, public health and overriding public interest within the scope of this exception.<sup>128</sup> Further,

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<sup>124</sup> Record ¶21.

<sup>125</sup> *Supra* note 104.

<sup>126</sup> *Id.*

<sup>127</sup> CMS art. III(5)(d).

<sup>128</sup> 13<sup>th</sup> Meeting of Conference of Parties, *Application on Article III of the Convention*, UNEP/CMS/COP13/Doc.21/Annex 2 (Oct 14, 2019).



the proviso mandates that such exceptions should be precise as to content, limited in space and time and not operate to the disadvantage of the species.<sup>129</sup>

*Firstly*, trophy hunting of the Royal Markhor is permitted as an extraordinary circumstance because it is necessary for combating *Mycoplasma capricolum* infections,<sup>130</sup> contributes to community medical expenses<sup>131</sup> and is in the public interest of the Dione Ginsu community. *Secondly*, the hunting is restricted in time and space as only 10 Markhors are permitted to be hunted annually and such hunting does not operate to the disadvantage of the species as established above.

*Therefore*, trophy hunting complies with Article III.5.d. *Therefore*, trophy hunting through the auction process does not violate CMS.

## **II. THE BAN ON THE IMPORTATION OF ROYAL MARKHOR HUNTING TROPHIES VIOLATES CONVENTIONAL INTERNATIONAL LAW.**

The ban on importation of Royal Markhor trophies is not justified under Article 20(a) and 20(g) of the Astor-Rishmak Trade Agreement [“ARTA”] [A]; and Article XIV.A.1 of the Convention on International Trade in Endangered species of Wild Fauna and Flora<sup>132</sup> [“CITES”] [B].

### **A. ASTOR’S IMPORTATION BAN IS NOT JUSTIFIED UNDER ARTICLES 20(A) AND 20(G) OF ARTA.**

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<sup>129</sup> CMS art. III(5).

<sup>130</sup> Record ¶18.

<sup>131</sup> Record ¶16.

<sup>132</sup> CITES.



Under Article 11 of the Astor-Rishmak Trade Agreement [“ARTA”], the use of quantitative restrictions on imports is explicitly prohibited, disallowing measures that restrict the quantity of goods entering a country. The introductory language of Article XX is crucial in assessing whether a member’s reliance on any of the exceptions is legitimate. In *Brazil-Retreaded Tyres*, the General Agreement on Tariffs and Trade<sup>133</sup> [“GATT”] Appellate Body recalled that the chapeau serves to ensure that members' right to avail themselves of exceptions is exercised in good faith in order to protect legitimate interests, not as a means to circumvent one member's obligations towards other WTO members.<sup>134</sup> Astor’s ban does not meet the requirements for an exception under Article 20(a) [i]; or under Article 20(g) of ARTA [ii].

(i) **The ban on importation doesn’t fall under the exception of Article 20(A).**

Article 20(a) of the ARTA provides that an exception to trade obligations may be made if the measure is necessary to protect public morals. However, Astor’s reliance on this provision to justify its ban on the importation is misplaced. Astor alleges that the hunting of Royal Markhor raises significant moral concerns of animal welfare similar to the ones observed in the case seal hunting where there was a huge public outrage.<sup>135</sup>

There is no logical basis for the comparison between seal hunting and the present case because the hunting of seals was criticized due to the cruel and inhumane manner of killing whereas, the

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<sup>133</sup> GATT.

<sup>134</sup> ABR, *Brazil Retreated Tyres*.

<sup>135</sup> ABR, *EC – Seal Products*; Conconi, Paola, & Tania Voon, *EC–Seal Products: The Tension Between Public Morals and International Trade Agreements*, 15 *World Trade Rev.* 211, 211-34 (2016).



hunting of Royal Markhors is strictly regulated and is carried out by seasoned professional hunters. Moreover, there is no public outcry or protests in Rishmak over the killing of the Royal Markhors.

Therefore, Astor's attempt to justify its ban under Article 20(a) is unfounded. The moral concerns that might otherwise support such an exception are absent in this case, rendering the ban an unjustifiable restriction on trade under ARTA.

**(ii) The ban on importation doesn't fall under the exception of Article 20(G).**

For a measure to be "relating" to the conservation of natural resources, a substantial relationship between the measure and the conservation of exhaustible natural resources needs to be established.<sup>136</sup> Furthermore, the measure must be applied in conjunction with domestic restrictions, affecting both imports and domestic production or consumption.

The primary issue in Astor's reasoning is that the ban disrupts a critical cash stream supplied by Rishmak's regulated hunting auction system which is very important as the proceeds of sale by foreign hunters is directly invested in conserving the Royal Markhor.<sup>137</sup>

Furthermore, the ban is in violation of the mandate of Article 20(G) which requires states to impose similar measures in their domestic consumption or production. From the facts stated in the record, it can be conclusively held that Astor has not imposed such restrictions in its domestic legal

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<sup>136</sup> Xavier Fernández-Pons, *Conservation and Sustainable Use of Biodiversity in the International Regulation of Trade in Goods*, in *Biological Diversity and International Law* 87 Marta Campins Eritja & Teresa Fajardo del Castillo eds., (2021).

<sup>137</sup> Record ¶16.



framework thereby unable to fulfil the prerequisites of Article 20(G). Therefore, the ban is not justified under Article 20(G) exception.

**B. ASTOR'S IMPORTATION BAN ON ROYAL MARKHOR TROPHIES VIOLATES ARTICLE XIV.A.1**

**READ WITH RESOLUTIONS 2.11 AND ARTICLE III OF CITES.**

Under CITES, the Royal Markhor is listed in Appendix I, which provides the highest level of protection for species facing extinction.<sup>138</sup> However, CITES does not categorically prohibit all trade in species listed in Appendix I. Rather, it allows trade in these species under strict regulation and only when it is not detrimental to the survival of the species.

**(i) The ban violates Article III and Resolution 2.11 regarding role of non-detriment findings in regulating trade.**

Under Article III of CITES, the regulation of trade in specimens of Appendix I species is subject to specific conditions. Article III.2.A mandates that an export permit shall be granted only if the exporting country's Scientific Authority has confirmed that the export will not be detrimental to the survival of the species. This provision is very vital for ensuring that the trade only has positive implications on the conservation rather than causing harm.

Astor by imposing the importation ban ignores the non-detriment findings of the exporting state and consequently, Rishmak is deprived of crucial resources to treat diseases like *Mycoplasma Capricolum*. The broad prohibition imposed by Astor ignores the collaborative international framework delineated in CITES. Resolution 2.11 highlights the significance of upholding

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<sup>138</sup> Record ¶7.





exporting countries' Scientific Authorities' determinations and encouraging cross-border association to secure that controlled trade activities strengthen species preservation efforts.<sup>139</sup>

Astor, by imposing the ban unilaterally, violates the legal mandate provided under CITES and also deprives Rishmak of its legitimate financial revenue which it requires to fulfil the aim of achieving species conservation. Astor's failure to participate in international cooperation, as required by CITES, reveals a disrespect for the broader conservation framework established by the Convention.

(ii) **The ban violates Article XIV.A.1 read with Resolution 6.7 regarding procedural and substantive requirements.**

Article XIV.1.A of CITES grants member states the right to adopt stricter domestic measures concerning trade in species listed under Appendix I, including the possibility of a complete prohibition on such trade. Article XIV read with Resolution 6.7 stipulates that before putting a ban i.e. imposing a stricter domestic measure, it is necessary to have a consultation and discussion process with the other range state where the species exist naturally, thereby balancing the rights of both the importing as well as exporting state.<sup>140</sup>

In the present case, Astor failed to include Rishmak in the decision to impose the ban violating the cooperative spirit of CITES as mandated by Resolution 6.7. By neglecting Rishmak from the

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<sup>139</sup> CITES Resolution Conf. 2.11, Trade in Hunting Trophies of Species listed in Appendix I, COP 2, San Jose (1979).

<sup>140</sup> CITES Resolution Conf. 6.7, Interpretation of Article XIV, Paragraph I, of the Convention, COP 6, Ottawa (1987).



decision-making framework, Astor challenges the rights of the Dione Ginsu community, an indigenous population that depends on measured Royal Markhor hunting for sustenance.

The advisory panel of the CITES recognises that the ban under paragraph 1 of Article XIV may have adverse or negative effects on the conservation of the species which goes against the very objective of putting the ban.<sup>141</sup> It suggests that any difficulties that arise with respect to the adoption of stricter domestic measures can be resolved by mutual consultation and cooperation.

Furthermore, Resolution 10.13 also recommends “*commercial trade may be beneficial to the conservation of species and ecosystems when carried out at levels that are not detrimental to the survival of the species in question*”.<sup>142</sup> The ban imposed by Astor essentially contributes towards the decline of the Royal Markhor as the community would no longer have sufficient financial resources to invest in its conservation activities ultimately harming the species for the protection of which the ban was imposed in the first place.

Additionally, Article XIV, while allowing domestic measures, does not provide free rein for states to neglect their broader treaty obligations. The ban imposed by Astor disregards the interconnectedness between the twin goals of community well-being and species conservation. The ban takes away the important sustenance mechanisms in the form of the proceeds from sale of hunting rights thereby exposing the community to severe social and economic hardships.

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<sup>141</sup> CITES Resolution 6.7, *Ibid* Note 136.

<sup>142</sup> 10th Conference of Parties, CITES Resolution Conf. 10.13, *Implementation of the Convention for Tree Species*, Doha (2010).



*Therefore*, Astor’s invocation of Article XIV to justify its ban is procedurally flawed due to the failure to consult Rishmak, as required under Resolution 6.7, and substantively inconsistent with CITES’ conservation objectives. The ban undermines the regulated trade framework designed to protect the Royal Markhor and endangers the Dione Ginsu community’s subsistence rights, thereby weakening the very conservation efforts it seeks to protect.



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## CONCLUSION

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THE RESPONDENT, RISHMAK, *respectfully requests* the Court to adjudge that:

1. Trophy hunting of the Royal Markhor through the auction process complies with conventional international law; and
2. Ban on importation of Royal Markhor hunting trophies violates conventional international law.

**Respectfully submitted,**

AGENTS *of the* RESPONDENT

